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BRIEFS

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In the Supreme Court of the United States

CARL J. MARINELLO, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction under 26 U.S.C. 7212(a) for corruptly endeavoring to obstruct or impede the due administration of the tax laws requires proof that the defendant acted with knowledge of a pending Internal Revenue Service action.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 839 F.3d 209.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2016. A petition for rehearing was denied on February 15, 2017 (Pet. App. 40a). The petition for a writ of certiorari was filed on March 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of corruptly endeavoring to obstruct or impede the due administration of the tax laws, in violation of 26 U.S.C. 7212(a); and eight counts of willfully failing to file tax returns, in

violation of 26 U.S.C. 7203. The district court sentenced petitioner to 36 months of imprisonment, to be followed by one year of supervised release. The court of appeals affirmed. Pet. App. 1a-39a.

1. Petitioner owned and managed Express Courier Group/Buffalo, Inc. (Express Courier), which operated a freight service between the United States and Canada. Pet. App. 3a. For over a decade, petitioner failed to file corporate and personal income tax returns. *Id.* at 4a. Petitioner paid his employees in cash and did not issue them (or himself) the documents necessary to report their income to the Internal Revenue Service (IRS). *Id.* at 3a-4a. He shredded or discarded most of Express Courier's records, including bank account statements, employee work statements, receipts, and bills. *Id.* at 3a. Petitioner also frequently diverted corporate funds for his personal use, including by paying his mortgage and his mother's living expenses from business accounts and by having the company make weekly cash "contributions" to his wife. *Id.* at 4a.

In 2004, the IRS received an anonymous tip that petitioner was engaged in an unlawful scheme to avoid paying taxes. Pet. App. 4a. The IRS investigated the allegation but was unable to substantiate it based on the information then available. *Ibid.* Petitioner had no knowledge of that investigation. *Ibid.*

In 2005, petitioner admitted to his attorney that he had not filed tax returns for several years. Pet. App. 4a. The attorney told petitioner that failing to file tax returns was improper and referred him to a certified public accountant. *Ibid.* The accountant, too, told petitioner that he and Express Courier needed to file tax returns and pay taxes. *Ibid.* The accountant asked petitioner to produce Express Courier's records

so that the accountant could submit the necessary information to the IRS, but petitioner (who had destroyed the records) never did so. *Ibid.* Instead, he ignored the advice of his lawyer and accountant and continued his practice of keeping no business records and not filing tax returns. *Id.* at 5a.

In 2009, the IRS reopened its investigation of petitioner. Pet. App. 5a. During an interview with an IRS special agent at petitioner's home, petitioner stated that he "could not recall the last time he had filed an income tax return." *Ibid.* Petitioner initially told the agent that he did not file personal or corporate tax returns because he and Express Courier made less than $1000 per year, *ibid.*, but that was false: in each year between 2005 and 2008, for example, Express Courier took in hundreds of thousands of dollars in gross receipts and petitioner diverted tens of thousands of dollars from the corporation's coffers to pay his personal expenses. *Ibid.*

Petitioner eventually admitted to the IRS agent that he knew he was supposed to file tax returns and pay taxes but that he "never got around to it." Pet. App. 5a (citation omitted). Petitioner also acknowledged that he took money from Express Courier to pay his personal expenses and that he had systematically destroyed Express Courier's records over the course of several years. *Ibid.* Petitioner told the agent that he destroyed the records because it was "the easy way out" and was "what he had been doing all along." *Id.* at 6a (brackets and citation omitted).

2. A federal grand jury charged petitioner with one count of corruptly endeavoring to obstruct and impede the due administration of the Internal Revenue Code, in violation of 26 U.S.C. 7212(a) (Count 1); and eight

counts of willfully failing to file individual and corporate tax returns, in violation of 26 U.S.C. 7203. C.A. App. 75-84.

Count 1 alleged a violation of the so-called "omnibus clause" of Section 7212, which makes it a crime to "corruptly * * * obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration" of the Internal Revenue Code "in any * * * way." 26 U.S.C. 7212(a). The grand jury alleged that petitioner violated that provision by, "among other thing[s]":

(1) "failing to maintain corporate books and records" for Express Courier;

(2) "failing to provide [petitioner's] accountant with complete and accurate information" regarding petitioner's personal income and Express Courier's business income;

(3) "destroying, shredding and discarding business records of Express Courier";

(4) "cashing business checks received by Express Courier";

(5) "hiding income earned by Express Courier in personal and other non-business bank accounts";

(6) "transferring [Express Courier's] assets to a nominee";

(7) "paying employees of Express Courier with cash"; and

(8) using money from Express Courier's business accounts "to pay personal expenses."

C.A. App. 75-76; see Pet. App. 6a-7a.

The district court instructed the jury that, to convict petitioner on Count 1, it needed to find unanimously and beyond a reasonable doubt that petitioner "acted corruptly" and "with the intent to impede or obstruct the due administration of the Internal Revenue laws." C.A. App. 432. The court explained that a person acts "corruptly" if he "act[s] with the intent to secure an unlawful advantage or benefit, either for [him]self or for another." *Ibid.* The court also instructed the jury, over petitioner's objection, that it had to unanimously agree that petitioner committed "at least one" of the "obstructive acts" listed in the superseding indictment but that it need not agree on which specific act petitioner committed. *Id.* at 433; see Pet. App. 7a-9a. The jury convicted petitioner on all counts. Pet. App. 10a.

Petitioner moved for a judgment of acquittal or a new trial on Count 1 on the ground that the government failed to prove that he was aware of a pending IRS investigation at the time he engaged in obstructive conduct and that he "knowingly interfere[d] with [that] investigation." Pet. App. 10a. The district court concluded that Section 7212(a) does not require such proof and denied petitioner's motion. *Id.* at 10a-11a; see *id.* at 51a-57a.

3. The court of appeals affirmed. Pet. App. 1a-39a. As relevant here, petitioner argued that a conviction under the omnibus clause of Section 7212(a) requires proof that the defendant acted with knowledge of a pending IRS investigation. Pet. C.A. Br. 23-25. Petitioner noted that the Sixth Circuit had adopted such a requirement, see *United States* v. *Kassouf*, 144 F.3d 952, 957 (1998), and he urged the court of appeals to do the same, see Pet. C.A. Br. 23-25.

The court of appeals rejected petitioner's argument. Pet. App. 17a-30a. The court noted that, in the years since *Kassouf* was decided, every other court of appeals to have considered the question had rejected the Sixth Circuit's interpretation of Section 7212(a) and had held that the omnibus clause "criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known IRS investigation." *Id.* at 28a (citing cases). As the court explained, Section 7212(a) "prohibits any effort to obstruct the administration of *the tax code*, not merely of investigations and proceedings conducted by the tax authorities," and because "the IRS does duly administer the tax laws even before initiating a proceeding," a defendant need not be "aware[] of a particular [IRS] action or investigation" at the time he corruptly engages in acts of obstruction. *Id.* at 25a-26a (citations omitted; second brackets in original).[1]

4. Petitioner sought rehearing en banc, which the court of appeals denied. Pet. App. 41a. Judge Jacobs dissented from the denial of rehearing en banc, arguing that *Kassouf*'s interpretation of Section 7212(a) was correct. *Id.* at 41a-50a.

ARGUMENT

Petitioner contends (Pet. 11-20) that this Court's review is warranted to determine whether the offense of corruptly endeavoring to obstruct the administra-

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[1] Petitioner also argued on appeal that Section 7212(a) criminalizes only corrupt affirmative acts, not corrupt "failure[s] to perform an act," Pet. C.A. Br. 26, and that the district court erred in calculating the amounts of loss and restitution at sentencing, *id.* at 29-30. The court of appeals rejected those claims, Pet. App. 31a-39a, and petitioner does not renew them in his petition for a writ of certiorari.

tion of the tax laws, in violation of 26 U.S.C. 7212(a), requires proof that the defendant knew about a pending IRS action. That contention lacks merit. The court of appeals' decision is consistent with the interpretation of Section 7212(a) adopted by most other courts of appeals and does not conflict with any decision of this Court. Although the Sixth Circuit reached a different conclusion in *United States* v. *Kassouf*, 144 F.3d 952 (1998), that court has vacillated in its approach to Section 7212(a) over the years and has not yet had an appropriate opportunity to reconsider *Kassouf*'s holding in an en banc proceeding. This Court has repeatedly denied other petitions raising the same issue.[2] Nothing supports a different result in this case.

1. The omnibus clause of Section 7212(a) applies to those who corruptly endeavor to obstruct or impede "the due administration" of the Internal Revenue Code. 26 U.S.C. 7212(a). As the court of appeals noted, the IRS administers the Internal Revenue Code in ways that do not involve a formal administrative action, investigation, or proceeding. Pet. App. 25a-26a. Nothing in the statute's text requires that an IRS action, investigation, or proceeding already be underway when a defendant endeavors to obstruct the IRS's administration of the tax laws.

Rather than rely on the text of Section 7212(a), petitioner principally invokes (Pet. 17-20) an analogy to the general obstruction-of-justice statute, 18 U.S.C. 1503(a), which applies to any person who "corruptly or

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[2] See *Sorensen* v. *United States*, 136 S. Ct. 1163 (2016) (No. 15-595); *Crim* v. *United States*, 132 S. Ct. 2682 (2012) (No. 11-8948); *Wood* v. *United States*, 562 U.S. 1225 (2011) (No. 10-7419); *Massey* v. *United States*, 547 U.S. 1132 (2006) (No. 05-8633).

by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." *Ibid.* In *United States* v. *Aguilar*, 515 U.S. 593 (1995), this Court held that a corrupt endeavor under that provision must have a "nexus" in time, causation, or logic to the "administration of justice," which the Court defined as a judicial or grand jury proceeding. *Id.* at 599-600.

In reaching that conclusion, the Court relied on the "common" understanding of the term "administration of justice," *Aguilar*, 515 U.S. at 600-601 (citation omitted), and on its earlier decision in *Pettibone* v. *United States*, 148 U.S. 197 (1893), which concerned a predecessor statute to Section 1503(a) that prohibited obstruction of "the due administration of justice" in "any court of the United States." *Id.* at 202 (citing Rev. Stat. § 5399 (1878)). In *Pettibone*, the Court held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice *in a court* unless it appears that he knew or had notice that justice was being administered *in such court*." *Id.* at 206 (emphases added). Drawing on that history, *Aguilar* concluded that Section 1503(a)'s reference to the "administration of justice" applies to actions taken "with an intent to influence judicial or grand jury proceedings." 515 U.S. at 599. The Court expressly distinguished those judicial proceedings from "some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority." *Ibid.*

Aguilar's analysis is not transferrable to Section 7212(a). Section 1503(a) refers to obstruction of "justice," which this Court had previously associated with proceedings "in a court." Section 7212(a), in contrast,

refers to obstruction of the "due administration *of this title*" (*i.e.*, the Internal Revenue Code). 26 U.S.C. 7212(a) (emphasis added). As the court of appeals explained, "the IRS does duly administer the tax laws even before initiating" any particular "proceeding" involving an individual taxpayer, including "by carrying out [the agency's] lawful functions to ascertain income and to compute, assess, and collect income taxes." Pet. App. 25a (brackets and citations omitted); see *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1129 (2015) (recognizing that "information gathering" is "a phase of tax administration procedure that occurs before assessment, levy, or collection"). No predecessor statute or prior judicial construction supports the addition of an atextual pending-IRS-action requirement in Section 7212(a) or suggests that a person cannot corruptly endeavor to obstruct or impede actions that the IRS could be expected to take in the course of administering the tax laws.

Furthermore, unlike justice administered in a court proceeding—which is a defined, discrete event—tax administration is continuous, ubiquitous, and universally known to exist. People are therefore on notice that the IRS is administering the tax code even when they are not aware of a specific, pending proceeding against them. Corrupt efforts to obstruct that administration, including by destroying corporate records and diverting corporate funds in an attempt to frustrate efforts to determine tax liability and to avoid the payment of taxes that are lawfully due, come squarely within the terms of Section 7212(a).

Indeed, petitioner's construction of Section 7212(a) would, in the particular context of that provision, threaten to render the omnibus clause superfluous.

The first clause of Section 7212(a) specifically addresses corrupt endeavors "to intimidate or impede any officer or employee of the United States acting in an official capacity under this title." 26 U.S.C. 7212(a); see Pet. 19 (citing legislative history of Section 7212(a) for the proposition that Congress sought to prohibit "interfer[ence] with IRS employees' enforcement activities"). But the omnibus clause is unmistakably broader, reaching corrupt endeavors intended "in any other way" to "obstruct or impede[] the due administration of this title." 26 U.S.C. 7212(a). Unlike the first clause, the omnibus clause does not require action directed toward any particular IRS agent, as the lower courts have repeatedly recognized.[3] Interpreting the omnibus clause to require proof of a specific pending action or proceeding conducted by the IRS and its agents would effectively eliminate any distinction between the first and second clauses of Section 7212(a).

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[3] See *United States* v. *Pansier*, 576 F.3d 726, 734 (7th Cir. 2009) (noting that Section 7212(a) "contains two distinct clauses, which each describe a separate offense"); *United States* v. *Lovern*, 293 F.3d 695, 700 & n.5 (4th Cir.) (same), cert. denied, 537 U.S. 1058 (2002); *United States* v. *Kelly*, 147 F.3d 172, 175 (2d Cir. 1998) ("[A]lthough the first clause pertains only to conduct directed against a government official, the second or 'omnibus' clause is not so limited."); *United States* v. *Dykstra*, 991 F.2d 450, 452 (8th Cir.) (noting that the omnibus clause "conspicuously omits the requirement that conduct be directed at 'an officer or employee of the United States government'") (citation omitted), cert. denied, 510 U.S. 880 (1993); *United States* v. *Popkin*, 943 F.2d 1535, 1539 (11th Cir. 1991) (stating that the omnibus clause "expands the reach of the statute" and that the prohibited act "need not be an effort to intimidate or impede an individual officer or employee"), cert. denied, 503 U.S. 1004 (1992).

2. Petitioner asserts (Pet. 14-16) that curtailing the reach of the omnibus clause by requiring knowledge of a pending IRS action is necessary to avoid constitutional vagueness concerns and to prevent the exercise of "unfettered discretion [by] prosecutors." But the courts have found the necessary limits in the statute's *mens rea* requirement, which requires that the defendant act "corruptly." 26 U.S.C. 7212(a). As the district court instructed the jury in this case, that element requires the government to prove beyond a reasonable doubt that the defendant "act[ed] with the intent to secure an unlawful advantage or benefit either for [him]self or for another." C.A. App. 432; see, *e.g.*, *United States* v. *Floyd*, 740 F.3d 22, 31 (1st Cir.) (explaining that the term "corruptly" in Section 7212(a) means "acting with an intent to procure an unlawful benefit either for the actor or for some other person," and citing cases), cert. denied, 135 S. Ct. 124 (2014); 2 Leonard B. Sand et al., *Modern Federal Jury Instructions—Criminal* ¶ 59-33 (2016) (same).

That definition is more exacting than the definition of the term "corruptly" in 18 U.S.C. 1503(a).[4] In *United States* v. *Reeves*, 752 F.2d 995, cert. denied, 474 U.S. 834 (1985), the Fifth Circuit explained the

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[4] See, *e.g.*, *United States* v. *Richardson*, 676 F.3d 491, 508 (5th Cir. 2012) (defining "corruptly" in Section 1503(a) to mean "knowingly and dishonestly" or "with an improper motive"); *United States* v. *Ashqar*, 582 F.3d 819, 823 (7th Cir. 2009) ("with the purpose of wrongfully impeding the due administration of justice"), cert. denied, 559 U.S. 974 (2010); *United States* v. *Frank*, 354 F.3d 910, 922 (8th Cir. 2004) ("with an improper or evil motive or with the purpose of obstructing the due administration of justice"); cf. *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 705 (2005) (interpreting "corruptly" in 18 U.S.C. 1512(b) to mean "wrongful, immoral, depraved, or evil").

reasons for that difference. Because Section 1503 "covers only conduct that is related to a pending judicial proceeding," it "presupposes a proceeding the disruption of which will almost necessarily result in an improper advantage to one side in the case." *Id.* at 999. By contrast, "interference with the administration of the tax laws" in violation of Section 7212(a) "need not concern a proceeding in which a party stands to gain an improper advantage," so "there is no reason to presume that *every* annoyance or impeding of an IRS agent is done *per se* 'corruptly.'" *Ibid.* By limiting Section 7212(a) to "corrupt" acts "done with the intent to secure an unlawful benefit either for oneself or for another," *id.* at 1001, Congress "specifically insure[d] that potential violators will be on notice of what constitutes corrupt behavior under [S]ection 7212(a)," *id.* at 999; see *id.* at 999-1000 (rejecting interpretation that would have made any "bad," "evil," or "improper" purpose sufficient); cf. *United States* v. *Kelly*, 147 F.3d 172, 177 (2d Cir. 1998) (finding that the term "corruptly endeavors" in Section 7212(a) is "as comprehensive and accurate as if the word 'willfully' was incorporated in the statute").

Nor is there any merit to petitioner's suggestion (Pet. 15) that his proposed construction is necessary to avoid making Section 7212(a) redundant of other tax offenses. Even without a pending-proceeding requirement, the elements of Section 7212(a) differ from those of the other offenses petitioner identifies. For example, tax evasion requires proof of willfulness, the existence of a tax deficiency, and an affirmative act of evading or attempting to evade the tax. 26 U.S.C. 7201; see *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). Filing a fraudulent tax return re-

quires that the defendant willfully make and subscribe to a return, under penalty of perjury, which the defendant does not believe to be true and correct as to a material matter. 26 U.S.C. 7206(1); see *United States* v. *Bishop*, 412 U.S. 346, 350 (1973). Neither offense covers corrupt acts that fall short of actually filing a return, evading an existing deficiency, or attempting to do so. And both offenses carry penalties that are equally or more serious than a violation of the omnibus clause of Section 7212(a). See 26 U.S.C. 7201 (up to five years of imprisonment); 26 U.S.C. 7206 (up to three years of imprisonment); cf. *United States* v. *Sorensen*, 801 F.3d 1217, 1226 (10th Cir. 2015) (explaining that tax evasion is a "more serious crime" than tax obstruction and "requires different culpability and wrongdoing"), cert. denied, 136 S. Ct. 1163 (2016).[5]

The omnibus clause also serves an important role that is not served by the tax evasion and fraud statutes. "In a system of taxation such as ours which relies principally upon self-reporting, it is necessary to have in place a comprehensive statute in order to prevent taxpayers and their helpers from gaining

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[5] Petitioner asserts (Pet. 15) that the court of appeals' interpretation of Section 7212(a) would also encompass the misdemeanor offense of willfully failing to pay a tax or file a return. See 26 U.S.C. 7203. The court of appeals doubted that assertion, see Pet. App. 33a n.15, and it is not presented here. Consistent with Department of Justice policy, petitioner's failures to file tax returns were charged as standalone offenses and not as obstructive acts. See C.A. App. 76-84; see also U.S. Dep't of Justice, *Criminal Tax Manual* § 17.04(2) (2012), https://www.justice.gov/sites/default/files/tax/legacy/2013/05/14/CTM%20Chapter%2017.pdf (providing that "[p]rosecutors should not charge the failure to file a tax return as an endeavor" under Section 7212(a)).

unlawful benefits by employing that variety of corrupt methods that is limited only by the imagination of the criminally inclined." *United States* v. *Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991) (citation and internal quotation marks omitted), cert. denied, 503 U.S. 1004 (1992). For example, a defendant who promotes illegal tax-avoidance schemes is plainly obstructing the administration of the tax laws, even though the defendant's lack of knowledge of any particular client's tax situation may preclude prosecution for tax evasion. See *United States* v. *Crim*, 451 Fed. Appx. 196, 200-201 (3d Cir. 2011) (affirming the Section 7212(a) conviction of a defendant who spoke at a "tax evasion seminar" and promoted the unlawful use of trusts to evade income taxes), cert. denied, 132 S. Ct. 2682 (2012). Contrary to petitioner's suggestion (Pet. 15), the statute does not reach "legitimate but aggressive tax avoidance strategies." See C.A. App. 432 (requiring proof beyond a reasonable doubt of a defendant's corrupt "*intent* to secure an *unlawful* advantage or benefit") (emphases added). But it does reach schemes to unlawfully avoid tax liability by hiding assets and destroying records—which is what petitioner was convicted of doing.

3. As petitioner notes (Pet. 11-12), the Sixth Circuit has concluded that Section 7212(a) requires proof of a pending IRS action and the defendant's knowledge of that action. See *Kassouf*, 144 F.3d at 955-958; see also *United States* v. *Miner*, 774 F.3d 336, 344-345 (6th Cir. 2014) (same), cert. denied, 135 S. Ct. 2060 (2015). Every other court of appeals to have considered the issue has rejected the Sixth Circuit's interpretation and has held that the existence a pending IRS action is not required. See Pet. App. 28a (joining

"three of our sister circuits in concluding that [S]ection 7212(a)'s omnibus clause criminalizes corrupt interference with an official effort to administer the tax code, and not merely a known IRS investigation"); see also *Sorensen*, 801 F.3d at 1232 ("[Section] 7212(a) does not require an ongoing proceeding when a defendant corruptly endeavors to obstruct or impede the due administration of the tax laws.") (citation, alterations, and internal quotation marks omitted); *Floyd*, 740 F.3d at 32 & n.4 (same); *United States* v. *Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) (same), cert. denied, 547 U.S. 1132 (2006); cf. *United States* v. *Scheuneman*, 712 F.3d 372, 380 (7th Cir. 2013) (holding that losses resulting from obstructive conduct that predated an IRS investigation were properly included within a restitution award because the obstructive conduct formed a basis for the defendant's conviction under the omnibus clause, "which prohibits all manner of activities which may obstruct or impede the administration of the code") (citation and internal quotation marks omitted). A majority of the circuits that have not expressly considered the question have nevertheless affirmed convictions under the omnibus clause without any indication that the defendants acted in response to a pending IRS action, investigation, or other proceeding.[6]

The disagreement between the Sixth Circuit and other courts of appeals does not warrant this Court's review. Not only is the conflict comparatively thin,

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[6] See *Crim*, 451 Fed. Appx. at 200; *United States* v. *Phipps*, 595 F.3d 243, 244-245, 247 (5th Cir.), cert. denied, 560 U.S. 935 (2010); *United States* v. *Mitchell*, 985 F.2d 1275, 1276-1279 (4th Cir. 1993); *Popkin*, 943 F.2d at 1536-1537; *United States* v. *Williams*, 644 F.2d 696, 701 (8th Cir.), cert. denied, 454 U.S. 841 (1981).

but the Sixth Circuit has vacillated in its approach. Although it first adopted petitioner's proposed rule in its 1998 decision in *Kassouf*, the court expressly limited that decision "to its precise holding and facts" the following year. *United States* v. *Bowman*, 173 F.3d 595, 600 (1999) (affirming a conviction under Section 7212(a)'s omnibus clause for intentionally attempting to trigger an IRS investigation against third parties). In light of *Bowman*, even district courts within the Sixth Circuit did not thereafter follow *Kassouf*. See, *e.g.*, *United States* v. *Gilbert*, No. 3:09-CR-57, 2009 WL 2382445, at *3 (W.D. Ky. July 30, 2009) ("The most recent guidance from the Sixth Circuit indicates that an IRS action is not required.").

In 2014, however, the Sixth Circuit upset that settled understanding. In *Miner*, the court held that *Kassouf*'s approach remained binding in at least those cases that involve "defendants whose conduct in failing to disclose or in peculiarly structuring their income and financial transactions generally makes it more difficult for the IRS to identify and collect taxable funds." 774 F.3d at 345. The court did not independently analyze that question, however, relying instead on the Sixth Circuit's "first-in-time" rule to hold that insofar as "the rationales of *Kassouf* and *Bowman* conflict, we are bound to follow the former, not the latter." *Id.* at 344-345. Nonetheless, the court affirmed the defendant's conviction on the ground that the failure to instruct the jury about the need for a pending IRS action was "harmless" because "no real dispute" existed at trial that the defendant "acted at least with awareness that the IRS was actively investigating his clients when he engaged in most of his conduct." *Id.* at 346. That resolution made the case

less suitable for rehearing en banc, and the government did not seek further review.

Petitioner contends (Pet. 13) that "[t]here is no possibility of the circuit conflict resolving itself without this Court's intervention." That assertion is incorrect. Defendants convicted under the omnibus clause may challenge on appeal the sufficiency of the evidence establishing knowledge of a pending IRS proceeding. Defendants may also seek to challenge jury instructions: a court could, for example, conclude that *Bowman* continues to control in a case with analogous facts and instruct the jury accordingly, or it could otherwise fail to give an instruction that conforms to *Kassouf*. The government, too, may appeal a district court's pretrial decision to dismiss an indictment for failure to sufficiently allege knowledge of a pending IRS action. See, *e.g.*, *United States* v. *Reed*, 77 F.3d 139, 142 (6th Cir.) (en banc), cert. denied, 517 U.S. 1246 (1996). Any of those circumstances may present the Sixth Circuit with an appropriate opportunity to grant en banc review.

Moreover, several indications suggest that the Sixth Circuit may grant such review in an appropriate case. *Kassouf* was a divided opinion, see 144 F.3d at 960 (Daughtrey, J., concurring and dissenting); the panel in *Bowman* sought to limit *Kassouf* to its facts, see 173 F.3d at 600; and the panel in *Miner* relied on *Kassouf*'s status as binding precedent without endorsing the substance of its reasoning, see 774 F.3d at 344-345. The growing consensus among the circuits that *Kassouf* was wrongly decided provides a further reason for the Sixth Circuit to grant review. See Fed. R. App. P. 35 advisory committee's note (1998) (Amendments) (recognizing that a case "may be a strong

candidate for a rehearing en banc" when "the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict"); cf. *United States* v. *Corner*, 598 F.3d 411, 414 (7th Cir. 2010) (en banc) (noting the importance of en banc review where "th[e] circuit stands alone" on an issue and "can eliminate [a circuit] conflict by overruling a decision that lacks support elsewhere"). The current conflict would best be resolved by the Sixth Circuit's reconsideration of *Kassouf* en banc, without the need for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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